St. Luke's Hospital *and* Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local No. 108, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 14–CA–19362

December 7, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On October 10, 1989, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing a policy of prohibiting off-duty employees from distributing union literature on the Respondent's parking lot. The General Counsel excepts, contending that the Respondent's maintenance of a policy that prohibits off-duty employees from distributing union literature on the Respondent's parking lot, its informing an off-duty employee that such distribution was prohibited, and its removal of the union literature from the windshields of the automobiles in the parking lot was unlawful. For the reasons set forth below, we agree with the General Counsel.

The facts in this case, more fully set forth in the judge's decision, are essentially undisputed. On February 9, 1988,[2] after he had finished working, employee Keith Caragher met Union Representative John Watson in the employee parking lot where they handed out union literature to employees who were leaving work and placed the literature on the windshields of automobiles on the employees' parking lot. After about 30 minutes, Security Officer Gene Latham approached them and asked what they were doing. They told him they were distributing union literature and gave him a copy of the literature. Officer Latham, speaking into a hand-held radio, reported to the security office ''that the guy from the Union is out here again.'' A voice over the radio directed Latham to tell the union representative that he was on private property and had to leave. Latham responded, over the radio, ''but he's got an employee with him.'' The voice over the radio directed Latham to identify the employee and get his name. Caragher showed Latham his hospital identification badge and Latham wrote down his name. The voice over the radio said, ''we are on our way out.''[3]

When Director of Security and Transportation Robert Truetken arrived, he told Watson he would have to leave the property. Truetken questioned Caragher about his employment status with the hospital and asked Caragher what he was doing. Caragher replied, ''I work in the operating room. . . . I'm on my way home . . . and . . . on my own time.'' Caragher then asked Truetken if there was a problem with that. Truetken responded, ''Yes there is. You are not supposed to be doing that and you just better get the hell out of here.'' At that point both Caragher and Watson got in their cars and left the hospital premises. Truetken testified that he was approximately 30 to 45 feet from the area of the employee parking lot reserved for oncology outpatient parking when he had this conversation with Caragher and Watson.[4]

Caragher testified that he knew that he was placing the union literature on automobiles that belonged to other employees because they were parked in employees spaces, i.e., unmarked and unreserved spaces in the employee parking area,[5] and that all employees are required to display a parking sticker in the window of their automobiles.

Truetken testified that he established the policy of prohibiting the placing of literature on automobiles in the employees' parking lot because of the litter problem created when leaflets blow ''all over the hospital'' grounds, and as a result of complaints by persons whose automobiles were damaged by the placing of literature under windshield wipers. Truetken further testified that windshield wipers had been sprung and that some wiper blades had actually fallen off vehicles.

The judge found that the Respondent had ''established and maintained a uniform, consistent policy prohibiting the distribution of any type of literature under employee and patient windshield wipers on the employee parking lot,'' and that this policy had been in effect for at least 6 years, Truetken's tenure as director of security. The judge further found that the Respondent had adequate business justifications for establishing and enforcing its policy, which had been applied in a nondiscriminatory manner, and when balanced against

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] All dates are in 1988 unless otherwise indicated.

[3] In his decision the judge erroneously stated that ''the voice on the radio stated that Caragher and Watson were on their way out.''

[4] In his decision the judge erroneously stated that Truetken testified that Watson was placing union literature on automobiles within 30 to 45 feet of the parking area reserved for oncology and outpatient parking.

[5] In his decision the judge erroneously stated that Caragher testified that he was placing union literature on cars parked in employee spaces ''and in unmarked spaces which were so called unreserved.''

the failure of the Union to demonstrate that there were no alternative means available to the Union to communicate to the employees, the Respondent did not violate the Act.

Contrary to the judge, we find that the Respondent's maintenance and enforcement of a policy that prohibits off-duty employees from distributing union literature on the Respondent's property violates Section 8(a)(1) of the Act. The distribution by off-duty employees of union literature in company parking lots is clearly protected by Section 7 of the Act. *E. R. Carpenter Co*., 284 NLRB 273 fn. 1 (1987). Thus, the Board has stated, ''except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.'' *Tri-County Medical Center*, 222 NLRB 1089 (1976).

Here, Truetken, in response to Caragher's statement that he was distributing union literature on his own time, told Caragher that he was ''not supposed to be doing that'' and that he had better ''get the hell out of'' there.

Although Truetken testified that the Respondent's unwritten policy was to prohibit the placement of any type of literature on automobile windshields in the employee parking lot, Truetken failed to articulate this policy to Caragher. Rather than explain to Caragher that Truetken's ''problem'' with what Caragher was doing was limited to his method of distribution, Truetken's statements to Caragher constituted an absolute prohibition against any form of distribution on the employees' parking lot. In light of the Respondent's failure to advance any legitimate business reasons for this absolute prohibition, such an overbroad policy violates Section 8(a)(1) of the Act. *Tri-County Medical Center*, supra; *Orange Memorial Hospital*, 285 NLRB 1099 (1987).

Further, even if Truetken's statements to Caragher were deemed to accurately reflect the Respondent's policy, we find that the Respondent has failed to establish adequate business justification for its policy. The only evidence submitted by the Respondent regarding its business justification for its policy was the testimony of Truetken, who stated that the Respondent prohibited the distribution of literature on automobiles ''because of the litter . . . blowing all over the hospital'' grounds and because of ''complaints by our people having their cars damaged'' by the placing of literature under windshield wipers that led to windshield wipers being sprung and blades falling off. Truetken further testified that while he talked to Caragher on February 9, he observed the union literature blowing up against the tires of cars. The Respondent introduced no company records or reports documenting any past problems with litter or automobile damage resulting from the placement of literature on automobile windshields, nor was any other employee of the Respondent (e.g., an employee whose car had been damaged or a maintenance employee responsible for collecting litter on the parking lot) called to testify regarding any past problems. Under these circumstances, we find that the Respondent, through Truetken's vague, generalized testimony, has not met its burden of establishing legitimate business considerations necessary to justify its interference with Caragher's Section 7 right to distribute union literature in the employees' parking lot on nonworking time.[6]

Accordingly, we find that by maintaining and enforcing a policy that, in the absence of legitimate business reasons, prohibits off-duty employees from distributing union literature on the employees' parking lot, including informing off-duty employee Keith Caragher that distribution of union literature in the parking lot was prohibited and removing that literature from the windshields of employees' automobiles, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By maintaining and enforcing a policy that, in the absence of legitimate business reasons, prohibits off-duty employees from distributing union literature on the employees' parking lot, including informing off-duty employee Keith Caragher that distribution of union literature in the parking lot was prohibited and removing that literature from the windshields of employees' automobiles, the Respondent has violated Section 8(a)(1) of the Act.

2. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a policy that, in the absence of legitimate business reasons, prohibits off-duty employees from distributing

[6] The judge's reliance on *Rochester General Hospital*, 234 NLRB 253 (1978), and his consideration of whether the Union had reasonable alternative means of communicating with employees is misplaced. *Rochester*, unlike the instant case, involves access of *nonemployee* union organizers to the respondent's property, and the balancing test used by the Board in that case is not applicable to *employee* distributions on company property during nonworking time.

Further, we do not find that the record supports the judge's finding that Caragher and Watson did not limit their distribution only to automobiles belonging to employees on the parking lot. To the contrary, Caragher's undisputed testimony was that he knew that he was placing the literature on employee automobiles because they were parked in employee spaces and because of the employees' parking stickers displayed in the automobile windows. In the absence of any evidence that nonemployee automobiles were involved, the judge's finding can be explained only because of his erroneous recounting of Caragher's testimony, noted above.

union literature on the employees' parking lot, we shall order that the Respondent rescind the policy.

ORDER

The National Labor Relations Board orders that the Respondent, St. Luke's Hospital, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a policy that, in the absence of legitimate business reasons, prohibits off-duty employees from distributing union literature on the employees' parking lot, including informing off-duty employee Keith Caragher that distribution of union literature in the parking lot was prohibited and removing that literature from the windshields of employees' automobiles.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the policy orally announced to employee Keith Caragher on February 9, 1988, which prohibited him from distributing on his nonworking time union literature on the windshields of employees' automobiles parked in the employees' parking lot.

(b) Post at its facility in St. Louis, Missouri, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and enforce a policy that, in the absence of legitimate business reasons, prohibits off-duty employees from distributing union literature in the employees' parking lot, including informing off-duty employee Keith Caragher that distribution of union literature in the parking lot was prohibited and by removing that literature from the windshields of employees' automobiles.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the policy orally announced to employee Keith Caragher on February 9, 1988, which prohibited him from distributing on his nonworking time union literature on the windshields of employees' automobiles parked in the employees' parking lot.

ST. LUKE'S HOSPITAL

Rick Hampton, Esq., for the General Counsel.
Paul J. Schroeder, Esq., for the Respondent.
Richard Shinners, Esq., for the Charging Party (Union).

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at St. Louis, Missouri, on April 26, 1988. The charge was filed by the Union on February 10, 1988,[1] and the complaint and notice of hearing issued on March 22.

The complaint alleges that Respondent hospital committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act by prohibiting an employee of the hospital from distributing union literature and further by removing that literature from the windshields of employees' cars.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material, a nonprofit corporation duly organized under, and existing by virtue of, the laws of the State of Missouri.

At all times material, Respondent, a corporation with an office and place of business in St. Louis, Missouri, has been engaged in the operation of a hospital.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] All dates are in 1988 unless otherwise indicated.

During the 12-month period ending February 29, 1988, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000 and purchased and received at its St. Louis, Missouri facility goods and materials valued in excess of $10,000 directly from points outside the State of Missouri.

Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent is engaged in the operation of a hospital where it maintains 439 beds and employs approximately 1800 employees. Respondent possesses several parking areas including a visitors parking lot, an area for oncology patients, physician's parking lots, a 1600 space employee parking lot, and an additional 500 slots in a gargage for a total of approximately 2000 parking spots.

After finishing work on February 9, at approximately 3:30 p.m., Keith Caragher, an employee of Respondent, met Union Representative John Watson in the employee parking lot. This lot can be identified by a sign. Near this lot and the hospital's entrance are spaces reserved for oncology patients. These spaces are also identified by signs.

Caragher and Watson distributed union literature to employees by handing it to employees who were leaving work and also placing the literature on the windshields of automobiles on the parking lot.

At approximately 4 p.m. Gene Latham, Respondent's security guard, drove up in the security truck and asked Caragher and Watson what was going on. They told Latham they were handing out union information and also placing it on the windshields of vehicles. Latham was given a copy of the literature.

Latham then used his walkie-talkie to advise the individual at the other end that the Union was there again. A voice over the radio directed Latham to tell the union representative that he was on private property and that he had to leave. Latham responded over the walkie-talkie that the union representative had an employee with him. Latham was directed to identify that employee and Caragher showed Latham his ID badge. The voice on the radio stated that Caragher and Watson were on their way out.

Kreitler, the security officer, took a copy of the union literature and read it. Shortly thereafter, Robert C. Truetken, director of security and transportation, came out and told Watson he would have to leave the property. Watson asked Truetken about some letters Watson had sent the hospital. Truetken stated he didn't care about the letters and that Watson would have to leave. Truetken then directed someone over his walkie-talkie to notify the office that he was contacting the county police.

Truetken asked Caragher if he worked at the hospital and Cargaher responded that he did, in the operating room. Truetken asked him what he was doing out there and Caragher responded that he was handing out union information, that he was on his way home, and on his own time. He further asked Truetken if there was a problem with that and Truetken responded that there was, that he was not supposed to be doing that, and he had better get ''the hell'' out of there.

Watson asked Kreitler and Latham to identify themselves to him and they obliged. At that point Watson and Caragher got into their cars and drove out of the employee parking lot onto an adjoining road. They walked up a hill to a point where they could observe the employee parking lot. They saw that Latham was taking the handbills from under the windshields.

Several employees saw the security guards removing the union literature from automobiles at the same time. One of the guards, in response to a question from an employee, responded that he could remove the union literature because it was private property.

It is undisputed that employee Caragher was not disciplined by Respondent for his union activities in passing out literature and placing same under the windshields of automobiles.

The testimony of Robert Truetken, the director of security and transportation, is unrefuted that during the 6 years he has been in that job he has never knowingly permitted any establishment or organization to place literature on vehicles in the employee parking lot. Moreover, Truetken testified that he has directed his security people to prevent the distribution of literature from various establishments such as pizza parlors, car washes, oil-change businesses, or any other organization in a consistent manner. Truetken has also directed his security officers to remove literature that has been placed on automobiles in the employee parking lot. He testified that this policy was established due to the concern of litter blowing on the hospital grounds and as a result of complaints by individuals where cars have been damaged by the placing of literature under windshield wipers. Truetken testified that windshield wipers have been sprung and that blades have actually fallen off of the vehicles. Truetken further testified that on February 9, when he talked to Watson, he actually observed the literature of the color of the documents that had been placed under the windshields blown up against the tires of cars. The literature, in evidence as General Counsel's Exhibit 2, is comprised of four pages, the first page being pink and the last page being yellow.

The employee parking lot also functions as a parking facility for oncology and out-patient departments. The lot contains spaces specifically reserved for patients and staff of the oncology and out-patient departments. Truetken testified that these spaces are insufficient to handle patient volume for oncology and out-patients during normal business hours. Accordingly, patients park elsewhere in the employee parking lot, wherever they can find a spot. Truetken testified that Watson was placing union literature on automobiles within 30 to 45 feet of the area reserved for oncology and out-patient parking.

Caragher testified that he was placing literature on cars parked in employee spaces, and in unmarked spaces which were so-called unreserved. He also testified that there were parking stickers that employees have to display in the windshield of their cars. He did not testify that he made any special effort to place literature only under the windshields of cars bearing employee stickers.

Truetken also testified the he has received complaints from his employees whose windshields were damaged by the placement of literature under the windshields.

Conclusion and Analysis

I find that Respondent has established and maintained a uniform, consistent policy prohibiting the distribution of any type of literature under employee and patient windshield wipers on the employee parking lot. This policy has been in effect for at least 6 years, presumably prior to any union organizational efforts.

Moreover, it is uncontradicted that Respondent had adequate business justifications for establishing and enforcing this nondiscriminatory policy, in a nondiscriminatory manner. Unrefuted testimony divulges that on that very day, February 9, litter, i.e., the union literature, was observed by Truetken blown against the tires of automobiles. Furthermore, there were complaints in the past that damage ensued to vehicles as the result of placing literature under windshields.

The cases cited by counsel for General Counsel are inapplicable.

In *E. R. Carpenter Co*., 284 NLRB 273 (1987), the Respondent's defense was aimed at a violation of a state criminal code section. There was no litter problem or any company prohibition. Moreover, no damage to vehicles resulted.

In *Angelica Healthcare Service Group*, 284 NLRB 844 (1987), a supervisor's instruction against solicitation was limited to union solicitation. There was no evidence that the supervisor was attempting to enforce the Respondent's no solicitation rule contained in the employee manual.

Finally, in *Orange Memorial Hospital Corp*., 285 NLRB 1089 (1987), there was no evidence that patients frequented outside nonwork areas, nor was there any evidence of damage to vehicles.

The Union has not demonstrated that no other reasonable means exist to communicate its organizational purposes to employees.

I am convinced by a preponderance of the evidence that Caragher and Watson did not limit their distribution only to automobiles belonging to employees on the parking lot.

For example, on cross-examination, Watson was asked, ''John, how did you know that the windshields that you were putting the literature on were windshields of employees cars?'' Watson responded, ''My understanding of the employee lot is that parking is for employees only with the exception of a number of spots that are clearly marked for the oncology department and those spots are fairly close to the entrance of the oncology department.''

Evidence reflected that the designated spots were insufficient to handle the traffic, resulting in spillover during peak periods. Afternoons are peak periods.

I conclude that Respondent has a legitimate concern over litter and the protection of patient and employee vehicles. Balanced against the absence of any evidence that the union had no other means available to communicate to the employees, I find that the Respondent did not violate Section 8(a)(1) of the Act. *Rochester General Hospital*, 234 NLRB 253 (1978).

Accordingly, I shall recommend an order dismissing the complaint in its entirety.

Conclusions of Law

1. The Respondent employer is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegation that the Respondent Employer has engaged in conduct violative of Section 8(a)(1) of the Act has not been supported by substantial evidence.

[Recommended Order dismissing complaint omitted from publication.]